Joseph F. Sirangelo, Vincent Sirangelo, Phillip Emma, Angelo Servideo and Joseph Cillo d/b/a Anna Erika Home for Adults *and* Local 1115, Nursing Home and Hospital Employees Union. Case 29–CA–13914

April 16, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 16, 1991, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Joseph F. Sirangelo, Vincent Sirangelo, Phillip Emma, Angelo Servideo and Joseph Cillo d/b/a Anna Erika Home for Adults, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent argues, inter alia, in its exceptions that Eugene Wimmer and Steven Taylor should be denied backpay because they failed adequately to document their claims regarding interim employment and earnings. We find no support in the record for concluding that either Wimmer or Taylor willfully concealed interim earnings during the backpay period and we reject the Respondent's contentions.

April M. Wexler, Esq., for the General Counsel.
Gary C. Cooke, Esq. (Horowitz & Pollack, P.C.), for the Respondent.
Richard Greenspan, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This backpay proceeding was heard by me in Brooklyn, New York, on September 30 and October 18, 1991. The case arises out of a Board decision at 298 NLRB 124 (1990), wherein the Board ordered inter alia that the Respondent make whole Eugene Wimmer and Steven Taylor for any loss of earnings that they may have suffered because of their discharges on February 6, 1989. The Respondent has waived its rights under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusion of law underlying the above-noted Order.

The backpay specification as amended at the hearing alleged that the backpay period for both employees began on February 6, 1989, when they were discharged and ended on March 30, 1990, when they were offered reinstatement by the Respondent. In both cases, the backpay formula was based on the assumption that they would have worked a standard 40-hour week plus any overtime hours worked by a representative employee in the same job category. Therefore, the measure of gross backpay per calendar quarter would be their adjusted hours per week times their respective hourly wage rates, multiplied by the number of weeks in each quarter.

In the case of Wimmer no backpay is claimed after the first quarter of 1989 because he obtained permanent employment elsewhere and received earnings in excess of those earned while employed by the Respondent. It is conceded by the General Counsel that during the backpay period, Wimmer, during the first quarter, had earnings of $865. (It is agreed that his rate of pay during this time would have been $4.95 per hour.) The General Counsel contends that the total net backpay due to Wimmer (without counting interest) is $1,055.60.

The General Counsel contends that Taylor was hired to work a 40-hour week and therefore his backpay should be based on that figure. The General Counsel asserts that despite a diligent search for work, Taylor had no interim earnings during the first and third quarters of 1989. She concedes, however, that he earned $1440 during the second quarter of that year. She also concedes that no backpay is due after the third quarter of 1989 because Taylor obtained permanent employment elsewhere and earned a higher rate of pay in his new job than he earned at the Respondent. In the case of Taylor, the total net backpay (without counting interest) is claimed to be $4220.

The Respondent asserts that the figure of 48.5 adjusted hours per week credited to Wimmer is not justified by the evidence. It claims that Taylor should not be credited with 40 hours per week because during the 3 weeks that he worked before his discharge, he never worked 40 hours in any week. It also sought to prove that Taylor had additional interim earnings not reported to the General Counsel.

FINDINGS AND CONCLUSIONS

The Board has applied a number of different formulas to determine the backpay of discriminatees. The aim of using one formula as opposed to another, is to restore the discriminatees, as accurately as possible, to the economic situation that they would have been in absent the illegal discrimination against them. In this respect, the Board has ''broad discretion'' to shape or choose a formula designed to most nearly approximate what the discriminatees would have earned but for the illegal action against them. *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963). In *Brown & Root*, the court stated inter alia

> Prefatory to a discussion of respondents' attack on the formula employed by the Board in calculating the amounts of the back pay awards, it is well to note that the purpose of a back pay award is to make whole the employee who has been discriminated against as the result of an unfair labor practice. The employee is entitled [sic] to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period. Of course, an employee must use reasonable diligence to find employment during the period of discrimination. He is not entitle to back pay for periods during which he voluntarily remained in idleness.
>
> In solving the problems which arise in back pay cases the Board is vested with a wide discretion in devising procedures and methods which will effectuate the purposes of the Act.
>
> Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonable designed to produce such approximations. . . . We have held that with respect to the formula for arriving at back pay rates or amounts which the Board may deem necessary to devise in a particular situation, ''our inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved.'' [Case citations omitted.]

Further, once the General Counsel establishes the gross backpay figure, the burden is shifted to the Respondent to prove any diminution of the gross backpay either by way of interim earnings, unavailability for work, or willful loss of earnings. *NLRB v. Mastro Plastics Corp*., 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *Oil Workers v. NLRB*, 547 F.2d 598, 602–603 (D.C. Cir. 1976).

Respondent does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of so-called ''incredibly low earnings,'' but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work.'' *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 575–576 (5th Cir. 1966).

In meeting this burden, Respondent cannot merely rely on cross-examination of the claimant and allegedly impeaching testimony. *NLRB v. Inland Empire Meat Co*., 692 F.2d 764 (9th Cir. 1982). The evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore, and must show if, where, and when the discriminatee would have been hired had they applied. *McLoughlin Mfg. Corp*., 219 NLRB 920, 922 (1975); *Isaac & Vinson Security Services*, 208 NLRB 47, 52 (1973). *Champa Linen Service Co*., 222 NLRB 940, 942 (1976).

In the present case the evidence supports the General Counsel's proposition that the regular workweek for each of the two employees was 40 hours. In this regard, Vincent Sirangelo acknowledged that the regular workweek for its employees was 40 hours and in the case of Taylor, he testified that although Taylor was primarily hired to be a driver, he was given porter functions in order to bring him up to a 40-hour week.

The payroll records do not mitigate against a finding that the backpay formula should be based on a 40-hour week. In the case of Taylor, he worked during only 3 complete weeks. (Neither his first nor last week were full weeks.) In those 3 weeks, Taylor took 1 day off and therefore worked 38 hours, 32, and 39.7 hours in each of the weeks.

The record established that in late April 1989, the Company gave a 25-cent-per-hour raise to all employees who stayed beyond their probationary periods. I therefore conclude that Taylor would also have received such a raise had he not been discriminatorily discharged on February 6, 1989. This would then have brought his wage rate to $4.25 after May 1, 1989. Accordingly, on the basis that Taylor would have worked 40 hours per week during the backpay period and would have received a raise to $4.25 on May 1, 1989, his gross backpay for the first quarter would be $1280; for the second quarter—$2170; and for the third quarter—$2210. (As noted above, no backpay is sought for Taylor after the third quarter 1989.)

In the case of Wimmer, his records show that during the quarter ending September 25, 1988 (prior to his discharge), he worked 40 or more hours in 5 weeks, in excess of 39 hours in 3 weeks, and 31 hours during a week where 1 day was a holiday. He worked overtime during 5 of the 13 weeks and worked 36.5 or fewer hours in only 4 weeks. In the next quarter ending December 1988, Wimmer's records show that he worked 40 or more hours during 6 weeks, in excess of 39 hours in 3 weeks, and that he worked 32 or more hours in 2 other weeks in which there was a holiday. Of the quarter's 13 weeks, Wimmer worked overtime in 5 weeks, and worked 32 or fewer hours during only 2 weeks.

In my opinion, Wimmer would have continued to work overtime after his discharge. In calculating the amount of overtime hours that Wimmer probably would have worked, the General Counsel chose Anthony Pair, another employee in Wimmer's job classification, who worked regularly after Wimmer was discharged.[1] As I believe that the overtime hours worked by Anthony Pair are representative of the number of such hours that someone in Wimmer's position would probably have worked during the overtime period, I conclude that it is reasonable to use Pair's overtime hours as the basis for calculating Wimmer's lost overtime hours.

Using Pair's hours, the record shows that after Wimmer was discharged, and for the remainder of the first quarter of 1989, Pair worked 37 overtime hours. Since there were 8 weeks left in the quarter after Wimmer was fired, it is appropriate to divide 37 into 8 which averages out to 4.625 overtime hours during the backpay period. By multiplying 4.625 times 1.5 (representing wages at the overtime rate), this equals 6.94 hours. To arrive at Wimmer's average adjusted hours during the backpay period we then add 6.92 to 40 to give 46.9 hours per week. As Wimmer's pay rate was $4.95 at the time of his discharge, his average weekly earnings during the backpay period would be $232.16. Multiplying that

[1] Although there were many people who were hired to work as porters during the backpay period, the payroll records show that only a couple, Pair and Vilaverde, worked for any extended period of time and they respectively worked 37 and 32 overtime hours after Wimmer was discharged.

number by the 8 weeks remaining in the quarter after Wimmer was fired, gives $1857.24. Taking away the 2 hours that he worked during his final week of employment yields a gross backpay figure for Wimmer in the amount of $1,857.25 - $9.90 = $1,847.34.

The Respondent has not, in my opinion, met its burden of showing that either Wimmer or Taylor failed to make an adequate search for work or had additional interim earnings than what was listed in the backpay specification. In fact, Wimmer began working, albeit on a part-time basis, within 2 weeks of his discharge. (By the end of the first quarter, Wimmer had obtained permanent employment at the New York Shipyard Corp.) Taylor began working in June 1989 at Dave's Produce at $90 per day. In the latter regard, Taylor conceded that he was discharged from his job at Dave's Produce after 4 weeks and he further conceded that he was accused of stealing. Taylor denied however, that this was so and the Respondent has not shown that Taylor's discharge was caused by his alleged misconduct.[2]

The evidence shows that Wimmer had interim earnings during the backpay period of $865. Therefore, his net backpay would be $1,847.34 minus $865 = $982 not including interest.

The evidence also shows that Taylor had interim earnings during the second quarter of the backpay period of $1440. Accordingly, his net backpay is as follows:

Year	*Qtr.*	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1989	1st	$1,280.00	$.00	$1,280.00
	2d	2,170.00	1,440.00	730.00
	3d	2,210.00	.00	2,210.00

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Joseph F. Sirangelo, Vincent Sirangelo, Phillip Emma, Angelo Servideo and Joseph Cillo d/b/a Anna Erika Home for Adults, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Make payment to Eugene Wimmer the sum of $982 plus interest, less tax withholding required by Federal and state laws.

2. Make payment to Steven Taylor the sum of $4220 plus interest, less tax withholding required by Federal and state laws.

[2] In *Newport News Shipbuilding*, 278 NLRB 1030 fn. 1 (1986), the Board held that a discharge from interim employment will only toll backpay when the respondent has established that the discharge was for willful or gross misconduct.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.